Supreme Court, U.S.
FILED
AUG 15 1997
CLERK

No. 96-957

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

v.

CITY OF TARRANT, ALABAMA,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITIONERS' REPLY BRIEF

DENNIS G. PANTAZIS
(Counsel of Record)
BRIAN M. CLARK
(Counsel of Record)
GORDON, SILBERMAN, WIGGINS
& CHILDS, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
Telephone: (205) 328-0640

Counsel for Petitioners

August 15, 1997

25 pp

I. QUESTION PRESENTED

Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, § 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. § 1983?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Statutes and Rules Page

PETITIONERS' REPLY BRIEF

A. This Court Has Jurisdiction To Review The Order Of The Alabama Supreme Court.

This case arises out of the death of Alberta K. Jefferson in a fire at her home on or about December 4, 1993. Melvin Jefferson brought an action individually, and as the personal representative of Alberta K. Jefferson. As the representative of Alberta K. Jefferson's estate, Melvin Jefferson brought separate claims under Ala. Code § 6-5-410 (1975) (the "state law claim"), and pursuant to 42 U.S.C. § 1983 (*Id.*). Claiming is that the City of Tarrant, Alabama discriminated against Alberta K. Jefferson and other disfavored minorities by engaging in a pattern and practice and custom of denying protective services to disfavored minorities (JA, p. 10).

On June 24, 1995, defendant City of Tarrant, Alabama ("the City" or "Tarrant") moved for summary judgment. On June 30, 1995, the City filed a Motion for Judgment on the Pleadings (JA, p. 113). On July 17, 1995, Defendant's motions for Summary Judgment and for Judgment on the Pleadings were denied (JA, p. 113). Pursuant to Alabama Rule of Appellate Procedure 5(a), Judge Drayton James of the Circuit Court of Jefferson County, Alabama entered a "Statement of Circuit Court Judge" stating that seeking an immediate appeal of the §1983 survivorship question. (JA, p. 109). The question presented to the Alabama Supreme Court was, "Whether the survival of Alberta K. Jefferson's claim for compensatory damages under 42 U.S.C. § 1983 is governed by federal common law or by reference to the Alabama Wrongful Death Statute?" (JA, pp. 109-110). The Alabama Supreme Court granted permission to appeal (JA, pp. 115-116).

On July 12, 1996, the Supreme Court of Alabama issued its Opinion (JA, pp. 117-125) on the federal issue (JA, p. 118). The Alabama Supreme Court did not con-

sider the remaining state law claim. The Alabama Supreme Court, as to the § 1983 claim reversed the Trial Court's ruling on Defendant's motions for summary judgment and for judgment on the pleadings, and remanded the case for further proceedings consistent with its opinion (JA, p. 121). Plaintiffs filed an Application for Rehearing on the § 1983 question, which was denied on August 30, 1996 (JA, p. 126).

Defendant argues that the Alabama Supreme Court's decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a) because of the remand of the state law claim. Defendant goes on to argue that this Court is without jurisdiction because this Court's review of state court decisions is limited to "final judgments or decrees rendered by the highest court of the state in which a decision could be had." (Respondent's Brief, p. 4). However, final judgment as to the survivability of Alberta K. Jefferson's claim under 42 U.S.C. § 1983 **has** been rendered by the highest court in Alabama - the Alabama Supreme Court.

Defendant points out that the finality requirement is not a "technicality," (Appellees Brief, p. 5), but fails to mention that in deciding jurisdiction, the Court will examine "both the judgment and the opinion as well as other circumstances which may be pertinent in deciding whether a final judgment has been rendered." *Gospel Army v. Los Angeles*, 331 U.S. 534, 548 (1947).

Defendant urges an extremely limited, narrow, and literal reading of § 1257. The Court, however, has stated that a "practical rather than a technical construction" of the finality requirement should be given. *Cohen v. Beneficial Loan Corp.*, 69 S.Ct. 1221 (1949). *See also, Bradley v. Richmond School Board*, 94 S.Ct. 2006, 2022 n. 28 ("a pragmatic approach" should be taken on the question of finality). In *Hudson Distributors v. Eli Lily & Co.*, 84 S.Ct. 1273 (1964), the Court held that, "the fact that separate and unresolved issues are pending in the Ohio courts

and still subject to further proceedings . . . does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable within the meaning of 28 U.S.C. § 1257." *Hudson*, 84 S.Ct. at 1273. Similarly, the fact that separate state law issues remain in the Alabama state courts does not affect the finality of the Alabama Supreme Court's decision on the federal issue before this Court.

In *Cox Broadcasting Corp. v. Cohen*, 95 S.Ct. 1029 (1975), the Court enumerated four categories in which the Court has treated a decision on the federal issue involved as a final judgment for the purposes of 28 U.S.C. § 1257, and has taken jurisdiction despite the pendency of further proceedings in the lower state courts on separate and unresolved issues. Jurisdiction is found despite further state court proceedings on separable state law issues to avoid "the mischief of economic waste and of delayed justice." *Cox*, 95 S.Ct. at 1037. The *Cox* Court held that the Supreme Court has jurisdiction, despite pending, unresolved state law issues "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but that which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 95 S.Ct. at 1039. That is exactly the case here. The question of the survivability of Alberta K. Jefferson's claim, the only federal issue before the Court, has been decided. While the case has been remanded to the Circuit Court of Jefferson County, Alabama for proceedings on the state law claim, no review of the federal issue can be had by any Alabama court, regardless of the outcome on the state law claim. *See also, North Dakota State Water Pharmacy v. Snider's Drug Stores, Inc.*, 94 S.Ct. 407 (1973) (Court held there was jurisdiction because the federal issue would not survive the remand, whatever the result of further state proceedings); *Southland Corp. v. Keeting*, 104 S.Ct. 852 (1984).

Additionally, the *Cox* Court found Supreme Court jurisdiction over cases where the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state court proceedings. In this case, the issue of the survivability of the claim of the Estate of Alberta K. Jefferson will survive and require decision regardless of which party is successful on the state law claims. Simply put, the federal issue is separate and distinct from the state law claim such that the federal issue will be unaffected by any future proceedings on the state law claim. *See also, American Export Rides, Inc. v. Alvez*, 446 U.S. 274, 278 n. 7 (1980) (finality of separate merit time loss of society claim not affected by non-finality of other claims not yet tried, in reliance on second *Cox* category); *NAACP v. Clebourne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) (first amendment ruling deemed final despite remand for a recomputation of damages).

B. <u>It Is Clear That Death Is One Of The Constitutional Deprivations Meant To Be Remedied By 42 U.S.C. § 1983.</u>

The statutory language of 42 U.S.C. § 1983 does not provide for the survival of a claim brought pursuant to its provisions. However, there is no question that § 1983 is just as operative in cases where the constitutional wrong causes death as it is where a lesser injury results. The Court in *Robertson v. Wegman*, 98 S.Ct. 1991, 1994 (1978), noted that the survival of § 1983 actions is not specifically addressed by the statutory language of the Civil Rights Act. It has never been held that § 1983 actions do not survive the death of the constitutional victim. It has widely been held that § 1983 actions do not evaporate upon the death of the wronged party, and that the action survives by reference to the federal common law if the application of a state survivorship

provision affects the remedies available to a § 1983 litigant.[1]

Every federal court considering the question of whether state procedural provisions can limit the remedies available to a § 1983 claimant where the constitutional deprivation complained of causes death has answered that the state law must yield. Section 1983 remedies are not to be narrowly construed. The history of § 1983 stresses that, "as a remedial statute, it should be 'liberally and beneficiently construed.'" *Dennis v. Higgins*, 111 S.Ct. 865, 867 (1991), quoting Rep. Shallabarger, Cong. Globe 42nd Cong., 1st Sess. App. 68 (1871). The remedies available to a § 1983 claimant are to be widely construed where, "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

Beginning with *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), Courts throughout the country have recognized that Congress did not intend to foreclose § 1983 claims

---

[1]The lower federal courts have uniformly held that the application of a state statute in a death case that would in any significant way limit a § 1983 litigant's remedies is "clearly deficient in both its remedy and its deterrent effect." *Berry v. City of Muskogee*, 900 F.2d 1489, 1504 (10th Cir. 1990) (Oklahoma statute that would have limited damages in death cases to property loss and lost earnings would not be applied, and remedy would be provided by federal common law). *See, e.g., McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983), cert. denied, 464 U.S. 961 (1983) ("To whatever extent § 1988 makes state law applicable to Section 1983 actions, it does not require deterrence to a survival statute that would bar or limit the remedies available under Section 1983 for unconstitutional conduct that cases death."). *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (held that it would be inconsistent with federal laws to limit estate of decedent to $25,000.00 Wisconsin statutory amount in § 1983 death claim). A more complete list of similar cases is contained at p. 17 of Petitioners main brief.

when death, rather than a lesser injury, results. To contend that the absence of a specific statutory mechanism for survivorship actions precludes the survivorship of § 1983 claims is to give the civil rights statutes their narrowest construction. Such restrictive readings have "long been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, while reading text in light of context . . . to carry out in particular cases the generically express legislative policy." *Brazier*, 293 F.2d at 404, *quoting SEC v. Joiner Leasing Corp.*, 64 S.Ct. 120, 123 (1943).

In the face of overwhelming authority favoring the application of § 1983 to death actions. *See supra*, at note 1. Defendant cites general rules of statutory construction, concluding that because § 1983 does not expressly provide for survivorship, such actions are not to be found. Defendant's assertion that Congress did not intend to include death among the civil rights violations to be remedied by the Civil Rights Act of 1871 is simply false. In holding that the federal remedies provided for by § 1983 are supplemental to, and not *in place of or to be supplanted by* state law, the Court in *Monroe v. Pape*, 81 S.Ct. 473 (1961) cited no less than four instances from floor debates surrounding the Civil Rights Acts of 1871 wherein death is specifically mentioned as one of the constitutional wrongs to be remediated by the Civil Rights Act of 1871.[2]

[2]Additional support for reading § 1983 as intending a remedy for wrongful killings under color of law comes from an examination of a criminal civil rights act counterpart. Section 1 of the 1871 act was modeled after the criminal provision contained in § 2 of the Civil Rights Act of 1866 (current version at 18 U.S.C. § 242). With the exception that § 1 of the 1871 act was not limited to former slaves as was the earlier enactment, Rep. Shellabarger informed the House that § 1 of the proposed act was intended to establish a civil remedy in cases in which § 2 of the 1866 act created a criminal sanction. *Id.* Thus, "[b]ecause § 2 of the Civil Rights Act of 1866 had extended

By arguing that § 1983 never envisioned a cause of action surviving the injured party, Defendant suggests that this Court find that 36 years of cases from all over the country holding that § 1983 claims *do* survive have been decided in error. See, *Brazier, supra*, and cases cited at note 1. As the Court in *Moor v. County of Alameda, Cal.*, 93 S.Ct. 1785, 1792 (1973), recognized, existing federal law "will not cover every issue that may arise in the context of a federal civil rights action . . . [and that civil remedies will be found by looking] to principles of the common law, as altered by state law, *so long as such principles are not inconsistent with the Constitution and laws of the United States.*" A construction limiting § 1983 remedies to those causes of action specifically stated in the statutes is not favored.

Defendant argues that § 1983 should not apply because it states that anyone acting under color of state law who deprives another of their right shall be liable "to the party injured." 42 U.S.C. § 1983. The defendant draws the conclusion that, because the decedent is no longer living, there is no "injured party". First, this argument ignores the vast weight of lower court authority holding that § 1983 does provide a death remedy. Second, this Court need look no further than *Robertson*, *supra*, to see that this argument must fail. In *Robertson*, after the plaintiff filed a § 1983 action, but before the case proceeded to trial, the plaintiff died. The action abated under a Louisiana statute stating that such an action in Louisiana survives only in favor of a spouse, children, parents, or

the criminal sanction to situations in which persons acting under color of state law deprived others of their life, there can be little doubt that § 1 of the Civil Rights Act of 1871 was also intended to provide a civil remedy in such cases." *Berry*, 960 F.2d at 1501, citing Steinglass, *Wrongful Death Actions and Section 1983*, 60 I.d. L.J. 559, 645-47 (1985); *Steinglass, supra*, at 648; *see also Screws v. United States*, 65 S.Ct. 1031 (1945); *Brazier v. Cherry*, 293 F.2d 401, 404 & n. 9 (5th Cir.), cert. denied, 82 S.Ct. 243 (1961).

siblings. The plaintiff had no qualifying relatives. Had the Court wished to articulate the law as urged by the defendant, it merely had to state that because the party injured no longer survived, the cause of action was one to enforce *someone else's rights, and did not exist under the statutory language of § 1983.* Instead, the *Robertson* Court was very careful to distinguish instances in which the illegal conduct caused the plaintiff's death from the facts in that case, stating that its holding "does not, of course, preclude survival of a § 1983 action when such is allowed by state law, [internal citation omitted], nor does it preclude recovery by survivors who are suing under § 1983 for an injury to their own interests." *Robertson*, 98 S.Ct. at 1996, n.9.

C. The Existence Or Non-Existence Of Death Remedies In 1871 Does Not Preclude The Adoption Of Such A Remedy In A § 1983 Action.

Defendant argues that, because § 1983 does not contain a death provision, and that when the Civil Rights Act of 1871 was enacted, generally speaking, actions did not survive the death of the plaintiff, that if Congress had envisioned the survivorship of § 1983 actions, it would have provided for such. This argument of abatement by omission ignores this Court's holdings in *Dennis*, *Moor*, and *Sullivan*, *supra*, that suitable remedies are to be found where possible, and broadly construed, and that existing federal law will not cover every issue that may arise in the context of federal civil rights litigation. *Moor*, 93 S.Ct. at 1792.

The *Moor* Court recognized, and Defendant admits that, "the tort liability created by § 1983 cannot be understood in a historical vacuum." *Fact Concerts*, 473 U.S. at 258. This Court has recognized the necessity of suitable extension of the federal common law to provide death remedies.

> Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous." [internal citations omitted]

Moragne v. States Marine Lines, Inc., 90 S.Ct. at 1772, 1778 (1970).[3]

In *Moragne*, the Court rejected the common law rule against recovery for death in a maritime case, holding that a cause of action for death existed. The Court noted that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Moragne*, 90 S.Ct. at 1790. Similarly, "the ultimate rule adopted under § 1988 'is a federal rule responsive to the need whenever a federal right is impaired.'" *Robertson*, 98 S.Ct. at 1994, quoting *Moor v. County of Alameda*, 93 S.Ct. 1785, 1792 (1973). This Court has stated that a *federal* rule must be established that is responsive to the *federal* policies underlying § 1983. *See*, *Moor*, *supra*; *Robertson*, 98 S.Ct. at 1995. As such, it cannot

---

[3]The *Moragne* Court went on to explain that the lack of a "person injured" does not justify the harshness of the common law rule:

> Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter. It is true that the harms to be assuaged are not identical: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him - usually spouse and children - seek to recover for their total loss of one on whom they depended. This difference, however . . . does not seem to account for the law's refusal to recognize a wrongful killing as an actionable tort.

Moragne, 90 S.Ct. at 1778.

be said that the absence of a death remedy in the statutory framework of the Civil Rights Act of 1871 precludes the adoption of such a remedy where that remedy will effectuate the purposes of federally created rights.

Numerous lower federal courts, *see supra and Petitioner's main brief*, have held that the federal common law should be looked to in providing an adequate death remedy when reference to state law would restrict the remedies available. Moreover, this Court has articulated federal common law rules for damages to be provided in § 1983 cases. In *Smith v. Wade*, 103 S.Ct. 1625 (1983), this Court reiterated that punitive damages are available to § 1983 litigants despite the fact that the statutory language does not directly provide for such damages. The authority for punitive damages in *Smith* is general, without reference to any state law provision. The "deficiency" of § 1983 in failing to enumerate what categories of damages are awardable in § 1983 actions was not cured by the "borrowing" of state law. Instead, the Court laid down a uniform rule based upon the purposes of § 1983.[4] The proper course in this case is to provide for the survivorship of § 1983 actions against Alabama municipalities in a manner that is responsive to the policies underlying the federal cause of action. The Court in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala.), see discussion *infra*, provided such a remedy, the lower federal courts have provided such, and this Court should hold accordingly.

---

[4]Similarly, this Court in *Felder v. Casey*, 108 S.Ct. 2302 (1988), refused to apply a Wisconsin notice-of-claim statute that would have acted as a bar to a § 1983 action. The *Felder* Court held:

> [T]he Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942).

Felder, 108 S.Ct. at 2313-14.

D. <u>Section 1988 In No Way Mandates That State Law Be Applied To All Cases Where No Suitable Federal Rule Exists.</u>

Defendant suggests that in every case where the civil rights acts are "deficient", or do not furnish suitable remedies, that state law, regardless of the consequences, should be applied. This Court has held otherwise. A three step test is to be applied in deciding the appropriate rule. *Burnett v. Grattan*, 104 S.Ct. 2924, 2928 (1984).

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by *considering* application of state "common law, as modified and changed by the Constitution and statutes" of the forum state. A third step asserts the predominance of the federal interest: Courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States.

Id. (emphasis added).

Application of state law may be "considered", but the federal interest predominates. *See, Casey*, 108 S.Ct. at 2307 ("A state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted . . ."). It is difficult to imagine a state law more inconsistent with the federal policies underlying § 1983 than one which totally insulates municipalities from liability.[5] Defendant's construction effectively reads the last sentence of § 1988 out of the statute.[6]

---

[5]There is no question that municipalities are "persons" to whom the Civil Rights Act of 1871 applies. *Monell v. Dept. Of Social Svcs. of N.Y.*, 98 S.Ct. 2018, 2036 (1978), see *infra*.

[6]By arguing that § 1988 mandates that state law be applied to § 1983 death actions without regard to its effect on the remedies available, defendant essentially argues that § 1988 mandates that

E. <u>The Application Of The Alabama Wrongful Death Act To § 1983 Claims In A Manner That Would Cause Them To Abate Is Inconsistent With The Constitution And Laws Of The United States.</u>

The policy behind the Alabama Wrongful Death Act, Ala. Code § 6-5-410 (1975), which is "to protect life, to prevent homicide, and to impose civil punishment on takers of life." *Geohagen v. General Motors Corp.*, 279 So. 2d 436, 439 (Ala. 1973). This is not *per se* inconsistent with the policies underlying § 1983. The inconsistency is with an application of § 6-5-410 that completely insulates Alabama municipalities from liability.

The test for determining whether the application of a state survivorship provision is inconsistent with federal law is "whether application of state law would be inconsistent with the federal policy underlying the cause of action under consideration. *Robertson*, 98 S.Ct. at 1995. The policies underlying § 1983 claims are "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Id.* An application of the Alabama Wrongful Death Act that causes *every* § 1983 death claim against a municipality to abate, cannot compensate or deter.

The only federal court directly passing on the issue, *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), stated that, "The wrongful death statute should not be held to foreclose the recovery of compensatory damages against the governmental entity in question, for such a result would be inconsistent with the policies underlying § 1983." *Weeks*, 649 F. Supp. at 1309. Defendant argues

---

entire state law causes of action be imported into the federal scheme. This concept has been rejected. "[W]e do not believe that the section, without *Moor*, was meant to authorize the wholesale importation into federal law of state causes of action." *Moor*, 93 S.Ct. at 1792-93.

that the *Weeks* Court held that awarding compensatory damages is only required under § 1983 for losses incurred by the decedent's survivors (Resp. Brief, p. 33). Defendant attempts to argue that the holding of the *Weeks* Court is that the compensatory damages claims of survivors survive, but not those of the decedent. That is not the case. The *Weeks* Court held that the *claim* of the decedent for compensatory damages survives, but that the *measure* of those damages would be the loss of income from the decedent, loss of companionship and consortium, and pain and suffering of the survivors. The argument that *Weeks* does not afford Plaintiffs the recovery sought is pure sophistry. It provides the exact remedy sought - compensatory damages.

While Mrs. Jefferson cannot be compensated for her injuries, the failure to provide a compensatory damages remedy in this case, given the interplay between the Alabama Wrongful Death Act and the decision of this Court in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2746 (1981) mandates a compensatory measure of damages. The federal policy in favor of compensation for harm resulting from constitutional deprivations was enunciated in *Carey v. Piphus*, 98 S.Ct. 1042 (1977). Damages are to be available to § 1983 litigants for actions "found . . . to have been violative of . . . constitutional rights, and to have caused compensable injury . . ." *Carey*, 98 S.Ct. at 1048. *Carey* went on to hold that "there is no evidence that Congress meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Carey*, 98 S.Ct. at 1048. The total elimination of § 1983 liability for Alabama municipalities where death results from the constitutional wrong decimates the ability of § 1983 to have the intended deterrent effect.

The Court in *Carlson v. Green*, 100 S.Ct. 1468 (1980), pursuant to the federal common law, created a compensatory remedy that would further the policies underlying

a federal *Bivens* action, and prevent the abatement of such an action by the application of an Indiana survivorship provision. *Carlson* 100 S.Ct. at 1474. The *Carlson* Court, as well as the lower federal courts, see *supra*, have held that a compensatory remedy is necessary to further the compensatory and deterrence policies of § 1983. Compensatory damages are allowed in death cases as it is "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Bell v. Hood*, 66 S.Ct. 773, 777 (1946).

Lastly, Defendant suggests that the compensation of a decedent's estate for pain and suffering is a novel concept serving no legitimate end. That is hardly the case where thirty-two jurisdictions (as of 1975) have survival statutes or hybrid survival-wrongful death statutes allowing recovery for a decedent's conscious pain and suffering[7].

Deterrence is one of the policies underlying § 1983. Similarly, § 1988 mandates that a remedy is to be provided in order to "punish offenses against law . . ." However, Defendant continues to maintain the untenable position that the total elimination of § 1983 death claims against Alabama municipalities does not undermine § 1983's stated goal of deterrence.

The reason that § 1983's official-policy of deterrence would be severely undermined is that "Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under § 1983 for acts which cause deprivations of constitutional rights as long

[7]6. S. Speiser, *Recovery for Wrongful Death*, § 14.8 (2d ed. 1975) cited in *Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981), identifies thirty-two jurisdictions as having survival statutes or hybrid survival-wrongful death statutes that allow recovery for a decedent's conscious pain and suffering prior to death.

as the victims die." *Weeks*, 649 F. Supp. at 1305. In response to the obvious elimination of *any* deterrent affect on municipal defendants, the City asserts, at bottom,[8] that damages under § 1983 would have no affect on the actions of municipal actors. If Defendant's assumptions that municipal actors would never contemplate illegal activity were true, the whole system of § 1983 damages should be disregarded. If it were not that illegal activity in violation of § 1983 is contemplated, there would be no need for § 1983 liability *at all*. Similarly, while it seems incredulous to civilized persons that one would kill rather than maim to avoid liability, the fact that all 50 states now have survival statutes clearly shows that death is to be remediated and deterred. *See, Van Beeck v. Sabine*

[8]Defendant argues that in order to find that the Alabama Wrongful Death Act has even a marginal influence on the behavior of municipalities in Alabama, the Court would have to assume that Alabama municipalities (1) contemplate illegal activity in violation of § 1983; (2) are aware of the intricacies of the Alabama Wrongful Death Act and § 1983 remedial schemes; (3) would intentionally kill an individual or permit her to die . . . in order to avoid liability under Section 1983; and (4) would do so fully aware that they may still be subjected to liability for punitive damages in a state law action for wrongful death." (Respondent's Brief, p. 37). First, the fact that governmental entities do contemplate and implement illegal customs, policies, and procedures is the reason § 1983 liability has been extended to such bodies. *See Monell, infra.* If this Court had not decided there was a need for the tort-like remedy § 1983 provides, the statute would be obsolete. Second, if Respondent's argument is taken at face value, it would follow that we need not rely on any tort-based system, only the "clean hearts" of our municipal officers and employees. This defies common sense and our entire system of tort based liability, including § 1983 which "creates a species of tort liability." *Imbler v. Pachtman*, 96 S.Ct. 984, 988 (1976). This argument ignores the purposes for which § 1983 was enacted a remedy for "murder stalking about in disguise . . ., whippings and lynchings and banishment . . . visited upon unoffending American citizens . . ." *Berry*, 900 F.2d at 1501, quoting Cong. Globe 42nd Cong., 1st Sess. 236 at 374 (1871).

Towing Co., 300 U.S. 342, 346 (1937) ("there is not a state of the Union in which a remedy is lacking").

Defendant argues that § 1983 death liability should not be extended to municipalities in Alabama because of the availability of other remedies, including state law claims. The availability of a state law claim has no bearing on the availability of a § 1983 action.

> It is no answer that the state has a law which it enforced would give relief. The federal remedy is supplementary to the state remedy . . .

Monroe v. Pape, 81 S.Ct. 473, 482 (1961). The unique federal remedy, *see Felder, supra*, is unaffected by the existence of a state remedy. This is particularly true where, as stated in Petitioner's main brief, Alabama state law provides only a severely limited remedy.[9]

Similarly, the availability of a § 1983 claim against individuals does not obviate the need for a significant deterrent to official misconduct by the municipality. In *Monell v. Department of Social Services*, 98 S.Ct. 2018 (1978), this Court held that municipalities could not be found liable for the individual, discreet acts of its employees under § 1983. The Court rejected traditional *respondeat superior* liability for municipal officials. *Monell*, 98 S.Ct. at 2036. The *Monell* Court, however, did reiterate that municipalities are among those persons to whom the Civil Rights Act of 1871 applies where, ". . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 98 S.Ct. at 2035-36.

---

[9]The Alabama Wrongful Death Act claim in this case is wholly inadequate. It is inadequate because recovery on such state law claims against municipalities in Alabama is capped at $100,000.00 by Ala. Code § 11-93-2 (1975). Moreover, the state wrongful death claim does not provide any of the other relief afforded successful § 1983 litigants.

Section 1983 is appropriate to impose municipal liability for an unconstitutional policy that "although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law." *City of St. Louis v. Praprotnick*, 108 S.Ct. 915, 926 (1988). However, if only individual liability is available for constitutional deprivations by its employees and officials, there would be no incentive to put into effect policies to avoid § 1983 liability.

The Court has recognized the need for a damages remedy against municipalities, in addition to individuals, stating:

> Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials . . .

Owen v. City of Independence, MO, 100 S.Ct. 1398, 1416 (1980). If municipalities are insulated from § 1983 death claims, the deterrent effect on city policymakers where death occurs will be lost.

F. The Application Of Federal Common Law To The Survivorship Question Serves The Purposes Of § 1983 Actions.

In *Carlson*, if the relevant Indiana statute were applied to *Bivens* action, the jurisdictional limit of the federal court would not have been met, and the case would have been dismissed. The issue presented was: "Is survival of the cause of action provided by federal common law or

by state statutes?" *Carlson*, 100 S.Ct. at 1471. The Court spoke clearly.

> . . . Whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.

Carlson, 100 S.Ct. at 1474. Similarly, where blind reference to the Alabama Wrongful Death Act would abate *all* § 1983 death actions against municipalities in Alabama, the federal common law should be applied.

This Court, as well as the lower federal courts, have routinely relied upon the federal common law to provide adequate remedies to § 1983 litigants. In *Felder v. Casey*, *supra*, the Court held that "a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted." It is preempted by federal common law. In assuring that individuals whose federal constitutional or statutory rights are abridged may recover, *see Felder*, 108 S.Ct. at 2307, this Court has not hesitated to apply the federal common law. This Court held in Sullivan, "[A]s we read § 1988, . . . both federal and state rules on damages may be used, whichever better serves the policies expressed in the federal statutes." *Sullivan*, 90 S.Ct. at 406. Similarly, the Court in *Bell*, held that where a federal statutory right is involved, "federal courts may make use of any available remedy to make good the wrong done." *Bell*, 66 S.Ct. at 777.

Access to federal common law to provide a proper § 1983 remedy is not limited. It is not even limited by the very statute Defendant holds sacrosanct in this matter, 42 U.S.C. § 1988. While § 1988 does refer civil rights litigants to state law, it does so *only* "so far as the same is not inconsistent with" the federal statutory rights the Civil Rights Acts were enacted to remediate in the first place. An application of state law that would eliminate § 1983

death action effectively eliminates this statutory language.

The absence of a uniform, statutory, § 1983 survivorship scheme does not evidence any hostility toward such a remedy. This Court has given § 1983 "the effect its terms require, as affording redress for violations of federal statutes, as well as of constitutional norms. *Livadas v. Bradshaw*, 114 S.Ct. 2068, 2083 (1994), citing *Maine v. Thiboutot*, 100 S.Ct. 2502, 2504 (1980). Section 1983 does not fail to provide a remedy where Congress has not specifically enumerated the procedural vehicle for doing so. The law is that "apart from . . . *exceptional cases*, § 1983 remains a generally and presumptively available remedy for claimed violations of federal law." *Livadas*, 114 S.Ct. at 2083, citing *Dennis v. Higgins*, 111 S.Ct. 865, 868 (1991) (emphasis added). Simply put, the lack of a statutorily provided avenue of survivorship has no bearing on what remedies are available under § 1983.

The lower courts managed to fashion a federal remedy to remediate the federal rights protected by § 1983, *see supra*, without the explosion of litigation feared by Defendant. This Court also undertook to do so in *Carlson*. The *Carlson* Court recognized the need for uniformity in remedy rather than reliance upon the "vagaries of the laws of the several states . . ." *Carlson*, 100 S.Ct. at 1474

> . . . uniformity cannot be achieved if courts are limited to applicable state law. . . The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred.

Id. Similarly, § 1983 minicipal liability should not depend upon where the violation occurred.

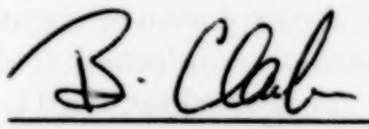
Plaintiffs do not ask this Court to undertake "the wholesale creation of a federal common law wrongful death and survival regime for § 1983" (Respondent's Brief, p. 44). Plaintiff seeks only to follow the statutory

directive of § 1988, and apply Alabama law so far as it is not "inconsistent with the Constitution and laws of the United States." The United States District Court for the Southern District of Alabama in *Weeks* was able to fashion a simple, workable remedy in line with the mandate of § 1988 and policies underlying § 1983. There is no reason to believe that such a remedy would spur additional litigation. The simple rule, articulated in *Weeks* and echoed throughout the country is that the application of a state survivorship provision that would, across the board, cause a § 1983 claim against a governmental entity to evaporate on death would be "inconsistent with the policies underlying § 1983." *Weeks*, 649 F. Supp. at 1309.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Alabama should be reversed.

RESPECTFULLY SUBMITTED,



DENNIS G. PANTAZIS
Counsel of Record
BRIAN M. CLARK
Counsel of Record

GORDON, SILBERMAN, WIGGINS
& CHILDS, P.C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
Telephone: (205) 328-0640